



**PennState**  
Dickinson Law

**DICKINSON LAW REVIEW**  
PUBLISHED SINCE 1897

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Volume 123

Issue 3 *SYMPOSIUM: Discretion and Misconduct:*

*Examining the Roles, Functions, and Duties of the  
Modern Prosecutor*


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Spring 2019

# Prosecutorial Misconduct: Mass Gang Indictments and Inflammatory Statements

K. Babe Howell

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## Recommended Citation

K. Babe Howell, *Prosecutorial Misconduct: Mass Gang Indictments and Inflammatory Statements*, 123 DICK. L. REV. 691 (2019).  
Available at: <https://ideas.dickinsonlaw.psu.edu/dlr/vol123/iss3/6>

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# Prosecutorial Misconduct: Mass Gang Indictments and Inflammatory Statements

K. Babe Howell\*

ABSTRACT

This Article examines inflammatory statements by prosecutors in the context of mass gang indictments. I contend that inflammatory remarks not only harm the justice system and defendants, particularly minorities, but also that, when prosecutors craft and repeat hyperbolic narratives about vicious gang wars, prosecutors may come to believe the narratives and become effectively blinded to the fact that these narratives are improper, unfair, and untrue. First, I review the professional rules, standards, and case law that prohibit. Then, drawing on press releases and trial transcripts from two mass gang indictments in New York City, I demonstrate how prosecution statements exaggerate and misrepresent the violence attributed to the targets of gang sweeps. This Article then discusses several societal harms that inflammatory narratives may exacerbate. Inflammatory narratives which improperly attribute carnage and enormous amounts of violence to large groups of young men of color play into three pressing problems of society—racism, wrongful convictions, and mass incarceration. Concluding, I call on all prosecutors, and particularly those who would make claims to a progressive agenda, to eschew inflammatory narratives and the over-prosecution of youth of color based on theories of vicarious liability.

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INTRODUCTION

*It is better that a crime go unwhipped of justice than that this theory of implied continuance of conspiracy find lodgment in our law, either by affirmance or tolerance. Few instruments of injustice can equal that of implied or presumed or constructive crimes. The most odious of all oppressions are those which mask as justice.*

—Justice Robert H. Jackson<sup>1</sup>

When I last wrote about prosecutorial discretion and the ethical duty to seek justice, I did so in the context of the overburdened lower criminal court systems—in which individuals are charged with misdemeanor offenses.<sup>2</sup> In that article, I argued that the prosecutor’s duty to seek and serve justice should lead prosecutors to reexamine their role in minor cases where enforcement of laws were marked by racial disparities and defendants were “processed” with little regard to substantive guilt or innocence.<sup>3</sup> I called upon chief prosecutors to align their offices’ practices with the duty to pursue equal enforcement of the law by declining to prosecute minor offenses where enforcement was marked by racial disparities and recommended electing district attorneys with progressive agendas.<sup>4</sup> While prosecutors, in general, have not changed their practices,<sup>5</sup> there has been movement to elect progressive prosecutors—

1. *Krulewitch v. United States*, 336 U.S. 440, 457–58 (1949) (Jackson, J., concurring).  
2. See K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285 (2014).  
3. See *id.* at 286, 334.  
4. See *id.* at 288, 331.  
5. Many have changed their rhetoric, claiming to be progressive and creating conviction review units, but the actions of many “progressive” prosecutors belie their claims. See, e.g., Josie Duffy Rice, *Cyrus Vance and the Myth of the Progressive Prosecutor*, N.Y. TIMES (Oct. 16, 2017), <https://nyti.ms/2yN26gx> [<https://perma.cc/8484-8484>].

and the movement appears to be gaining ground.<sup>6</sup> This movement gives me hope that this Article analyzing gang prosecutions—a much more complex misuse of the power and discretion of the prosecutor’s office—can similarly create pressure to realign the prosecutor’s role with the goal of serving justice, and not simply seeking convictions.

The difference in the stakes involved and the prosecutor’s role in prosecuting mass gang indictments versus processing minor offenses is enormous. Gang indictment charges are felonies, whereas the cases in lower criminal courts include misdemeanors and non-criminal violations. The sentence exposure in gang indictments may range from decades to life, while sentences imposed for minor offenses are often fines, community service, or short jail sentences. Moreover, unlike minor offenses in which prosecutors simply process cases<sup>7</sup> resulting from unequal policing,<sup>8</sup> the prosecutor is a willing helpmate to law enforcement in mass indictments and gang takedowns.<sup>9</sup>

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.cc/92P5-N8F7] (discussing the harsh practices pursued by “progressive” District Attorneys from New York County, New Orleans, Los Angeles, and Philadelphia (R. Seth Williams, not Larry Krasner)).

6. See, e.g., Josie Duffy Rice & Clint Smith, *Justice in America Episode 7: The New Progressive Prosecutors?*, APPEAL (Sept. 5, 2018), <https://bit.ly/2Sd9FGN> [<https://perma.cc/7L6U-KAWL>] (discussing the movement to elect progressive prosecutors); Emily Bazelon & Miriam Kirsky, *There’s a Wave of New Prosecutors and They Mean Justice*, N.Y. TIMES (Dec. 11, 2018), <https://nyti.ms/2rwmFbz> [<https://perma.cc/92TA-W4LR>]. A “progressive” prosecutor may commit to any number of reforms designed to mitigate the harsh and discriminatory application of criminal law. Among these reforms the progressive prosecutor may embrace a platform to reduce mass incarceration, reduce pre-trial detention by eschewing cash bail, eliminate or reduce prosecution of minor and victimless crime, address racial disparities in enforcement, promote diversion and restorative responses, reduce fees and fines, address police misconduct, and correct wrongful convictions.

7. See Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1715–20 (2010) (analyzing data on decisions to decline prosecution and concluding that prosecutors are less likely to exercise equitable discretion on petty offenses to order).

8. For discussion of racial disparities in policing of minor offenses and the impact on communities of color, see U.S. DEP’T OF JUSTICE, CIV. RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 62–70 (2015), <https://bit.ly/2DJR3G4> [<https://perma.cc/94C3-5KGW>]; JOHANNA MILLER & SIMON MCCORMACK, N.Y. CIVIL LIBERTIES UNION, SHATTERED: THE CONTINUING, DAMAGING, AND DISPARATE LEGACY OF BROKEN WINDOWS IN NEW YORK CITY 5–6 (2018), <https://bit.ly/2FwRNBI> [<https://perma.cc/3WTS-NXZ4>].

9. See Press Release, Preet Bharara, United States Attorney Southern District of New York (April 27, 2016), <https://bit.ly/2GkKJXi> [<https://perma.cc/SLV7-F4WF>] (containing statements of Bharara, NYPD, Homeland Security, DEA, and ATF relating to a joint “takedown”).

Nonetheless, as one looks beyond the press releases describing murder and mayhem that accompany “gang takedowns,”<sup>10</sup> similarities emerge. Much like the processing of minor offenses, the prosecution of mass gang indictments is marked by both enormous racial disparities and little to no process by which individual guilt is determined. Many of the defendants arrested in connection with “gang wars” that involve killings, shootings, assaults, and robberies are not themselves accused of killings, shootings, assaults, or robberies.<sup>11</sup> Faced, however, with conspiracy charges that can mean spending the rest of their lives in jail, defendants take pleas in droves.<sup>12</sup> As in misdemeanor cases, the evidence relating to each defendant is not reviewed by courts; “progressive” prosecutors withhold witness statements, co-conspirator statements, and other evidence until after the defendant has decided to take a plea deal or roll the dice. When the evidence from these mass indictments is delivered, often on the eve of trial, it threatens to overwhelm the solo practitioners who are assigned to represent the few brave defendants who assert their right to trial.<sup>13</sup>

During the last year and a half, I have reviewed the available federal court records and plea and sentencing transcripts related to the Bronx 120, and state court files related to a 2014 mass takedown in Harlem, both to generate an overview of outcomes in these cases

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10. This Article is based on a review of outcomes related to two of the largest “gang takedowns” in New York history: (1) the mass indictments of 103 individuals that resulted in the June 4, 2014 Harlem gang sweep brought by District Attorney Cyrus Vance, Jr.’s office; and (2) the mass indictments of 120 individuals on April 27, 2016, from the Bronx Eastchester Gardens and adjacent areas brought by United States Attorney for the Southern District of New York (SDNY) Preet Bharara.

11. See *infra* Part II regarding the Bronx Eastchester Gardens gang prosecutions of April 2016, and the 2014 Harlem raids. In the Bronx gang takedown, 15 individuals were arrested for each homicide related to the takedown. In the Harlem raid, 103 individuals were indicted in connection with two homicides.

12. BABE HOWELL & PRISCILLA BUSTAMANTE, REPORT ON THE BRONX 120 MASS “GANG” PROSECUTION 21 (forthcoming April 2019) (on file with author). Of the Bronx 120, only two individuals rejected pleas and went to trial. All but six of the 103 defendants in the Harlem indictment were resolved without trial; five of the six who went to trial on the sprawling conspiracy charges were convicted. Trial transcripts are on file with the author.

13. Because of conflict of interest rules, experienced and well-resourced institutional defender offices are unable to represent defendants in mass indictments. See MODEL RULES OF PROF’L CONDUCT r. 1.7(a)(1) (AM. BAR ASS’N 2018) (prohibiting the representation of clients with adverse interests); MODEL RULES OF PROF’L CONDUCT r. 1.9 (AM. BAR ASS’N 2018) (discussing the duties lawyers owe to former clients). Under Rule 1.7(a)(1), an institutional defender will be able to take on only one defendant in a mass indictment. Moreover, institutional defenders will typically have engaged in past representation of multiple defendants in mass gang takedowns.

and to gain insight into the process each defendant receives and the factual bases for the charges. Additionally, I have reviewed trial transcripts for the handful of cases that have gone to trial. While there is little doubt that many of the defendants are guilty of some substantive crime,<sup>14</sup> the actual guilt or innocence of participating in a conspiracy or a Racketeer Influenced and Corrupt Organization (RICO) enterprise seems quite beside the point. Like misdemeanor cases, outcomes are determined based on past criminal history rather than proof of guilt or innocence with respect to the broader conspiracy or RICO charges.<sup>15</sup>

How can enormous cases charging serious felonies be brought and adjudicated by plea bargain or trial by jury without regard to the quality and sufficiency of the evidence? One answer to this question lies in the use, from beginning to end, of inflammatory narrative. The narrative advanced by the Government in these cases—that of massive, deadly gang wars—is so overpowering that bail is routinely denied, speedy trial requirements waived, protective orders given on all discovery, and even individuals whose predicate acts are misdemeanors may be forced to plea to felonies<sup>16</sup> and lectured about their roles in turning their neighborhoods into war zones and terrorizing their communities.

The dangers of these overblown and inflammatory narratives are not limited to the impact on the defendant, judges, and jurors. The narratives appear to have a compelling impact on the prosecutors themselves, influencing their decisions—from pre-dawn raids and insistence on pre-trial detention to plea offers and procedural stances. Moreover, these inflammatory narratives are propounded to the media and contribute to the racism and fear that divide our

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14. Many defendants have already been prosecuted or convicted for conduct charged as overt acts in the state conspiracy cases or predicate acts in the federal RICO cases. Double jeopardy does not bar use of prior convictions or acquittals as predicate acts because both the jurisdiction and the charges are different than prior charges.

15. Cf. Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 656, 673 (2014) (finding that facts relating to innocence and guilt were largely irrelevant to the disposition process and distinguishing this from the more adjudicative model in felony justice).

16. In the federal Bronx 120 case, all but five defendants entered felony pleas or were convicted of a felony after trial (two went to trial). Two defendants were allowed to plead to a misdemeanor charge, and three others received nolle prosequis. HOWELL & BUSTAMANTE, *supra* note 12. In the Harlem sweeps, two defendants received misdemeanors, and 14 were adjudicated youthful offenders, but the vast majority pleaded to felony offenses. New York Division of Criminal Justice Services statistics are on file with the author.

society; this in an era when violent crime is hovering near historic lows.<sup>17</sup>

Although the flaws that mar the mass gang indictment are myriad, this Article focuses on inflammatory statements exclusively. Part I briefly examines the relevant professional standards and case law prohibiting the use of inflammatory statements. Part II examines statements made in a press release and press conference by the United States Attorney for the Southern District of New York (SDNY) regarding the 120 defendants indicted in the Bronx in April 2016, and in opening statements in trials of individuals charged by New York County District Attorney in the 2014 raid in Harlem. Finally, in Part III, I discuss the harms to procedural and racial justice and urge prosecutors to attend to their duty to seek justice by eschewing inflammatory narratives and mass gang indictments. As would-be prosecutors across the country take progressive stances on issues of bail, mass incarceration, and conviction integrity, they must attend to the consequences of inflammatory rhetoric that fans and exaggerates fear of youth of color and deprives these defendants of fair individualized due process of law.

## I. PROFESSIONAL MISCONDUCT: INFLAMMATORY STATEMENTS

The Model Rules of Professional Conduct, the ABA Standards for the Prosecution Function, and case law all prohibit the use of inflammatory statements that risk heightening prejudice against the accused in criminal trials. These rules apply both before and during trial. Nonetheless, improper statements are common, indeed pervasive, sources of prosecutorial misconduct.<sup>18</sup>

The Model Rules require prosecutors to refrain from making extrajudicial comments “that have a likelihood of heightening pub-

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17. For information on the national decline in violent crime rates from 1960 to 2016, see NATHAN JAMES, CONG. RESEARCH SERV., RECENT VIOLENT CRIME TRENDS IN THE UNITED STATES 2–5 (2018), <https://bit.ly/2DK12Ly> [<https://perma.cc/2MMJ-VCCW>] (showing rates of violent crime and homicide in 2016 at levels as low as 1970 and 1960 despite an increase over 2015). For preliminary analysis of trends through 2018 showing lower rates of violent crime, see AMES GRAWERT & CAMERON KIMBLE, BRENNAN CTR. FOR JUSTICE, CRIME IN 2018: UPDATED ANALYSIS 1–4 (2018), <https://bit.ly/2sWnQlh> [<https://perma.cc/CRS8-7M73>]; John Gramlich, *5 Facts About Crime in the U.S.*, PEW RES. CTR. (Jan. 3, 2019), <https://pewrsr.ch/2F511oH> [<https://perma.cc/N4U9-B9JS>].

18. As Bennett Gershman puts it in his treatise on prosecutorial ethics, although prosecutors are prohibited from using “[a]rguments calculated to inflame the fears, passions, and prejudices of the jury[,] [p]rosecutors find such appeals irresistible.” BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 11.2 (2d ed. 2018).

lic condemnation of the accused.”<sup>19</sup> This rule applies to pre-trial publicity and requires the prosecution to exercise reasonable care to make sure that those associated with the prosecution team refrain from prejudicial extrajudicial statements as well.<sup>20</sup>

The ABA Standards for Criminal Justice govern both the opening and closing statements in a manner that is relevant to this project. In opening, the prosecutor “should not allude to any evidence unless there is a good faith and reasonable basis for believing that such evidence will be tendered and admitted into evidence.”<sup>21</sup> In closing, “the prosecutor should not make arguments calculated to appeal to the prejudices of the jury” nor should the prosecutor make “argument[s] which would divert the jury from its duty to decide the case on the evidence.”<sup>22</sup>

The rule that an attorney must refrain from inflammatory argument has special importance when applied to the prosecutor. The importance of these rules are explained in the commentary to the standards. Unlike most attorneys, the prosecutor serves as a representative “of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all.”<sup>23</sup> As to the rule prohibiting allusion to outside evidence, “it is highly improper” for a prosecutor to refer to factual matters beyond the record because of the special role of and access to information possessed by the prosecutor.<sup>24</sup>

Prosecutorial conduct in argument is a matter of special concern because of the possibility that the jury will give special weight to the prosecutor’s arguments, not only because of the prestige as-

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19. MODEL RULES OF PROF’L CONDUCT, r. 3.8(f) (AM. BAR ASS’N 2018) (detailing the “Special Responsibilities of a Prosecutor”). The majority of jurisdictions have adopted or modified this special rule for prosecutor communications. See David Keenan et al., *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 229 (2011), <https://bit.ly/2PkYMxG> [<https://perma.cc/896T-6FMT>] (noting 43 jurisdictions have adopted this rule in full or in modified form). In jurisdictions where Rule 3.8(f) is not adopted, prosecutors are constrained by a general rule relating to trial publicity. See, e.g., N.Y. RULES OF PROF’L CONDUCT, r. 3.6 (N.Y. STATE BAR ASS’N 2018).

20. See MODEL RULES OF PROF’L CONDUCT, r. 3.8(f) (AM. BAR ASS’N 2018).

21. STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard No. 3-5.5 (AM. BAR ASS’N 3d ed. 1993).

22. *Id.* at Standard No. 3-5.8(d).

23. *Berger v. United States*, 295 U.S. 78, 88 (1935).

24. STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard No. 3-5.8 (AM. BAR ASS’N 3d ed. 1993).



sociated with the prosecutor's office, but also because of the fact-finding facilities presumably available to the office.<sup>25</sup>

Appeals to prejudices of the jury either in opening or closing are a frequent source of reversal.<sup>26</sup>

Remarks calculated to evoke bias or prejudice should never be made in a court by anyone, especially the prosecutor. Where the jury's predisposition against some particular segment of society is exploited to stigmatize the accused or the accused's witnesses, such argument clearly trespasses the bounds of reasonable inference or fair comment on the evidence. There are many cases in which courts have reversed convictions as the result of inflammatory remarks made by a prosecutor containing references to the defendant's race, religion, or ethnic background.<sup>27</sup>

Although the rules relating to prosecutorial misconduct and inflammatory comments, particularly those in closing argument, are clearly established, "misconduct by prosecutors in closing argument occurs with 'disturbing frequency' in criminal trials, and this problem has commanded the close attention and frustration of the appellate courts."<sup>28</sup>

As one frustrated appellate court wrote while confirming a conviction despite prosecutorial misconduct based on failure to object and harmless error analysis:

We continue to be concerned when trial counsel make improper arguments to a jury. At times it seems as if certain counsel consider the harmless and fundamental error rules to be a license to violate both the substantive law and the ethical rules that prohibit improper argument. We reiterate the admonition of Judge Blue in his specially concurring opinion in *Luce v. State*, 642 So.2d 4 (Fla. 2d DCA 1994): "Trial attorneys must avoid improper argument if the system is to work properly. If attorneys do not recognize improper argument, they should not be in a courtroom. If trial attorneys recognize improper argument and

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25. *Id.*

26. R. MICHAEL CASSIDY, PROSECUTORIAL ETHICS 101 (2005).

27. STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard No. 3-5.8 (AM. BAR ASS'N 3d ed. 1993).

28. CASSIDY, *supra* note 26; *see also*, Candice D. Tobin, *Misconduct During Closing Arguments in Civil and Criminal Cases: Florida Case Law*, 24 NOVA L. REV. 35 (1999) (discussing misconduct that occurs during closing arguments). In a concurrence that reveals the frustration that improper argument elicits, an appellate judge in Florida proposed requiring attorneys to watch and re-watch.

persist in its use, they should not be members of The Florida Bar.”<sup>29</sup>

The rights that the prosecution seeks to strip from the accused, freedom and reputation, are the most precious, and are protected by the highest standard of proof in our justice system. Closing statements that do not relate directly to the strength of the evidence have the effect of distracting from the burden of proof:

Prosecutors may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial misconduct is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence.<sup>30</sup>

References to community violence are even more damaging:

Violence in any community is clearly a great social concern, but “the pressing nature of the problem does not give prosecutors license to encumber certain defendants with responsibility for the larger societal problem in addition to their own misdeeds.”<sup>31</sup>

Despite the rules, standards, and case law prohibiting improper comment and inflammatory statements, the practice flourishes in part because even where prosecutorial misconduct is clear, improper and inflammatory statements will be considered in the context of all the evidence entered in a case and reversal will not necessarily follow.<sup>32</sup> Even where reversal does follow, repercussions for prosecutors are virtually non-existent.<sup>33</sup> Finally, improper

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29. *Bell v. State*, 723 So. 2d 896, 897 (Fla. Dist. Ct. App. 1998) (quoting *Luce v. State*, 642 So. 2d 4, 4 (Fla. Ct. App. 1994)) (upholding a conviction despite prosecutorial closing arguments that vouched for witnesses, argued matters not in evidence, commented on the right to trial, and urged the jury to send the defendant “a message”).

30. *United States v. Darden*, 688 F.3d 382, 392 (8th Cir. 2012) (quoting *United States v. Nobari*, 574 F.3d 1065, 1076 (9th Cir. 2009)).

31. *Darden*, 688 F.3d at 392 (quoting *United States v. Johnson*, 968 F.2d 768, 771 (8th Cir. 1992)).

32. *Darden v. Wainwright*, 477 U.S. 168, 179–80 (1986) (holding that although the prosecutor’s closing argument “deserves the condemnation it has received from every court to review it . . . [t]he relevant question is whether the prosecutor’s comments ‘so infected the trial with unfairness as to make the resulting conviction a denial of due process’” (quoting *Darden v. Wainwright*, 699 F.2d 1031, 1036 (11th Cir. 1983))); *see also* DANIEL S. MEDWED, PROSECUTION COMPLEX 110 (2012) (analyzing cases of exoneration based on actual innocence and finding that while reviewing courts found prosecutorial misconduct in closing arguments in nearly half the cases where the claim was raised, they nonetheless found such misconduct “harmless” in 19 of 31 cases).

33. *See* Keenan et al., *supra* note 19 (gathering data regarding the lack of consequences for prosecutorial misconduct and discussing how the doctrine of im-

summations are so common that defense counsel may fail to object and trial judges often entirely ignore inflammatory statements.<sup>34</sup>

Although inflammatory statements are common, they nonetheless constitute misconduct; whether this misconduct is commonly met by indifference or condemnation, reversal or acceptance, inflammatory statements have no place in the criminal justice system and they are particularly offensive in the context of mass indictments where the risk that the accused might be convicted based on the acts of alleged gang associates is high.

## II. INFLAMMATORY STATEMENTS IN “GANG TAKEDOWNS”

Turning to the specific context of gang prosecutions, gang allegations evoke prejudice even when conspiracies are not alleged and multiple defendants are not charged.<sup>35</sup> Recently, however, prosecutors’ offices have been collaborating with law enforcement to engage in “gang takedowns” which can result in indictments that target dozens of individuals. To understand how prosecutions unfold after “gang takedowns,” I have focused on two of the largest “gang takedowns” in recent history, both of which took place in New York. While our forthcoming report will analyze the outcomes of these two prosecutions, this Article focuses on the narratives that accompanied the takedowns and proposes that prosecutors across the country review statements made in connection with gang indictments for accuracy and fairness.

In New York City, to put it bluntly, the statements made in connection to the mass gang takedowns in press releases, opening statements, and closing arguments are not just inflammatory, they are hyperbolic and inaccurate. In this section, I will review some of these statements to support this conclusion.

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munity, weak rules, and byzantine state disciplinary action contribute to these failures); see also MEDWED, *supra* note 32, at 111 (noting that in the vast majority of cases reversed for prosecutorial misconduct in closing arguments, the prosecutor is not named in the reversing decision and thus does not even suffer personal or professional embarrassment).

34. See *United States v. Richardson*, 161 F.3d 728, 737 (D.C. Cir. 1998) (concluding that improper statements made by the prosecutor during closing argument caused substantial prejudice to defendant even though the defense counsel did not object and the trial court judge ignored the statements).

35. See Mitchell L. Eisen et al., *Probative or Prejudicial: Can Gang Evidence Trump Reasonable Doubt?*, 62 UCLA L. REV. DISC. 2 (2014) (examining the biasing effect of gang testimony in a mock trial designed to present insufficient evidence for conviction and finding ten percent of mock jurors voted guilty despite clear lack of evidence); Mitchell L. Eisen et al., *Examining the Prejudicial Effects of Gang Evidence on Jurors*, 13 J. FORENSIC PSYCHOL. PRAC., no. 1, 2013, at 1 (finding gang “affiliation” (defendant seen talking to a gang member) increased mock jurors findings of guilt by 15 percent (from 44 to 59 percent)).

A. *United States Attorney Press Conference with Investigatory Team*

The statements made by the United States Attorney for the SDNY and the law enforcement agents that he called to the podium at the press conferences following the predawn raids in the Bronx on April 27, 2016, are precisely the kind of extrajudicial statements “that have a likelihood of heightening public condemnation of the accused.”<sup>36</sup> Although half of those arrested in the sweep were not alleged to belong to either of the two “gangs” that were the target of the sweep, and most of the 120 were not convicted of firearms offenses or individual violence as predicate acts, this was not clear from media statements.<sup>37</sup>

Instead, the United States Attorney for the SDNY, Preet Bharara, began the conference by stating:

Today we announce what is believed to be the largest gang take-down in New York City History. We have charged *120 defendants in two rival Bronx Street gangs* with racketeering, narcotics, and firearms offenses. In addition, the charges include allegations of multiple murders, attempted murders, shootings, stabbing, and beatings, committed in furtherance of federal racketeering conspiracies.<sup>38</sup>

He went on to describe communities living in “constant dread that their children or other loved ones might become the victim of a stray bullet”<sup>39</sup> and concluded by saying, “when gangs proliferate, neighborhoods suffer, communities disintegrate, and innocent children die.”<sup>40</sup>

Former U.S. Attorney Bharara then turned the podium over to New York Police Department (NYPD) Police Commissioner Bill Bratton, who began by saying that the 47th and 49th Precincts had been “besieged by violence, *much of it at the hands of these two street gangs*, for much too long.”<sup>41</sup> He followed giving the numbers for *all the shootings and murders in the 47th Precinct* in the two

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36. MODEL RULES OF PROF'L CONDUCT, r. 3.8(f) (AM. BAR ASS'N 2018) (detailing the “Special Responsibilities of a Prosecutor”).

37. Based on prosecutorial sentence submissions, nearly half of the 120 were not alleged to be members of the two “gangs” targeted by the takedown. Only about one in six were convicted of possession of a firearm. HOWELL & BUSTAMANTE, *supra* note 12, at 9, 16–17.

38. USAOSDNY, *120 Members of Street Gangs in the Bronx Charged in Manhattan Federal Court*, YOUTUBE (Apr. 29, 2016), <https://bit.ly/2UD1hh4> [<https://perma.cc/7LNR-9PJC>].

39. *Id.* (occurring at roughly the 5:45 timestamp).

40. *Id.* (occurring at the 10:14 timestamp).

41. *Id.* (occurring at roughly the 11:17 timestamp) (emphasis added).

years prior to the “takedown” (17 murders in 2014, and 11 in 2015) before conceding that these were not all attributable to the rivalry.<sup>42</sup> Neither the Commissioner nor the U.S. Attorney shared the fact that these two years in which these gangs were allegedly wreaking havoc had fewer murders than ten of the previous 15 years.<sup>43</sup> More importantly, the concession that these gangs were not responsible for all of the homicides and murders did nothing to correct the impression that much of the violent crime in the area was attributable to these street gangs. There was no mention that over 94 percent of homicides in the 47th precinct in the prior decade were *not attributed* to the two “gangs” in the takedown.<sup>44</sup> Finally, U.S. Attorney Bharara then introduced Angel Melendez, head of U.S. Immigration and Custom Enforcement’s New York field office, who asserted, “these gangs operate in an area where, on an average, there is at least one shooting reported on a daily basis for the past five years.”<sup>45</sup>

This press conference masterfully elided the lines between truth and fiction. There was no distinction made between gang members and non-gang members; although nearly half of the 120 swept up were not alleged to be gang members, U.S. Attorney Bharara characterized all 120 as “in two rival Bronx Street gangs” in his remarks.<sup>46</sup> Nor was it clear from the press conference that most of the defendants were not accused of violent crimes. No information was provided in the press conference about which indi-

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42. Commissioner Bratton said that there had been 17 murders in 2014, and 11 in 2015. *Id.* (occurring at the 11-to-12-minute time stamp).

43. There was an average of 18 murders per year in the 47th precinct between 2000 and 2015. Only one year (2013) in the 21st century had fewer murders than the 11 murders that took place in 2015, the year prior to the raid. Five of the previous 15 years had over 20 homicides. COMPSTAT HISTORICAL DATA FOR MAJOR CRIMES BY PRECINCT 2000–2017, <https://on.nyc.gov/2BhB6VX> [<https://perma.cc/J35D-DSC2>].

44. *Id.* There were 138 murders in the 47th precinct from 2007 to 2015, the period covered by the indictment. There were eight murders listed in the press release and it is not entirely clear that all eight homicides listed in the press release were ever related to the gangs that were the focus of the takedowns. Only five of the eight homicides were mentioned as predicate acts in the indictments. *See* Indictment at 5–6, *United States v. Parrish*, No. 1:16-cr-00212 (S.D.N.Y. filed Apr. 12, 2016) [hereinafter *Parrish Indictment*] (attributing two murders to the “enterprise”); Indictment at 6–7, *United States v. Burrell*, No. 1:15-cr-00095 (S.D.N.Y. filed Apr. 12, 2016) [hereinafter *Burrell Indictment*] (attributing 3 murders to the “enterprise”).

45. USAOSDNY, *supra* note 38 (occurring at the 19:17 timestamp).

46. *See* USAOSDNY, *supra* note 38. Based on a review of sentencing submissions and transcripts, over fifty of the 120 individuals in the twin indictments were not alleged to be members of the BMB, 2Fly, or other gangs. HOWELL & BUSTAMANTE, *supra* note 12, at 9.

viduals committed the murders. Nor was it revealed that some of those suspected of the murders were already being held. The most egregious of the offenses described, the death of 92-year-old Sadie Mitchell struck by a stray bullet in her home seven years earlier, had already long been resolved in state court.

The official press release, like the press conference, exaggerated the gangs' contribution to crime. Although less than one homicide per year was associated with these indictments of 120 individuals and no assaults were specified in the indictments, the official press release described "the years-long gang war between 2Fly and BMB, which has led to *an enormous amount of fatal and non-fatal violence* between 2007 and the present in the Northern Bronx, including shootings, stabbings, slashings, beatings and robberies."<sup>47</sup> The release skirts the issue of the many non-gang members arrested by characterizing arrestees as "gang members and their associates."<sup>48</sup>

The press releases, the media coverage, and the press conferences—describing mayhem, terror, murders, and slashings—were used to augment support and even elicit praise for taking down 120 individuals—119 young men and a single woman—for a gang war that was based on hyperbole. Over 100 of those arrested were not alleged to have had any role in these homicides and many were not even alleged to be part of these gangs.

Like the press conference, the indictments (released with a press release by the U.S. Attorney for the SDNY) served to obscure the distinctions among defendants. The indictments contained only four charges, none of them necessarily violent.<sup>49</sup> The first charge is RICO conspiracy (an inchoate offense); the second and third charges, narcotic distribution; and the fourth, *use* of a weapon in connection to a RICO conspiracy or narcotics.<sup>50</sup> Murders and violence are alleged among the predicate acts that the RICO enterprise engages in, but there is no information in the indictments about which of the 120 engaged in violent predicate acts or when.<sup>51</sup> More importantly, for the non-members of the gangs

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47. Press Release, Preet Bharara, United States Attorney Southern District of New York (April 27, 2016), <https://bit.ly/2GkKJXi> [<https://perma.cc/SLV7-F4WF>] (emphasis added).

48. *See id.*

49. *See* Parrish Indictment, *supra* note 44, at 4, 12, 17, 22; Burrell Indictment, *supra* note 44, at 4, 13, 19, 23.

50. *See generally* Parrish Indictment, *supra* note 44; Burrell Indictment, *supra* note 44.

51. *See generally* Parrish Indictment, *supra* note 44; Burrell Indictment, *supra* note 44.

and non-violent defendants swept into the takedown, there was no information for the court or defense attorneys to determine who was alleged to have been marginally involved in non-violent conduct. Those swept up in this indictment were all tarred with the same broad brush, one designed to cause substantial prejudice and to associate all included with the mass indictments with all the crime that had occurred in their community.

There is certainly a grain of truth here. There's little doubt that there were rivalries between local gangs and that some of those charged took part in violent confrontations. There's even less doubt, however, that the statements from the U.S. Attorney, and these were not spontaneous, suggested that *all* were gang members and engaged in "an enormous amount of fatal and non-fatal violence." These statements were inconsistent with the evidence available for the vast majority of the defendants.

### *B. New York County District Attorney's Opening Statements*

In the trial of five co-defendants from the Manhattanville Houses, who were among the 103 individuals in the twin mass indictments involving Grant Houses and Manhattanville Houses in Harlem, New York County, Assistant District Attorney Jon Veiga used the opening moments of his opening statements to evoke a narrative of a massive gang war:

New York City, 2015. A city with 8 million stories. A city that gave us American Gangster. And that gave us, a stone's throw from this courthouse, old Five Corners, now Confucius Plaza, The Gangs of New York.

New York City 2015. Here and now. These defendants, their co-conspirators, and their sworn enemies gave us *the largest gang war* in the history of New York City.

You may not have realized this, but for about four-and-a-half years, between January of 2010 and June of 2014, right here in Manhattan, right in West Harlem, in your backyard, a violent, respect and revenge-fueled gang war raged between these defendants, their associated gangs, Money Avenue or MA, the Make It Happen Boys or MHB, and their rival street gang, known as 3 Staccs.<sup>52</sup>

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52. Transcript of Record at 14–15, *People v. Garnes*, No. 2373/14 (N.Y. Sup. Ct. June 2, 2015) [hereinafter *Garnes Transcript*] (emphasis added) (on file with author).

The prosecutor went on to allude to violence beyond the record without “a good faith and reasonable basis for believing that such evidence will be tendered and admitted into evidence.”<sup>53</sup>

The sheer magnitude of a nearly half-decade-long uninterrupted pattern of carnage attributed to the deadly feud between the MA, MHB and 3 Staccs gang is both mind-numbing and spine-chilling.

*This trial will not, indeed this trial cannot, present the full array of mayhem that these three gangs inflicted not only upon each other, but upon innocent bystanders, their communities and the people of New York City.*

You can, however, expect to hear at this trial testimony and see evidence regarding two murders; nearly 20 non-fatal shootings; approximately 10 incidents of shots fired, but, thankfully, missing people; about a dozen or so recoveries of firearms that hadn’t yet been used to shoot people; roughly half a dozen or so stabbings and slashings; and a handful of robberies.<sup>54</sup>

These statements violate both the rules barring inflammatory statements and the rule prohibiting reference to evidence beyond the record.

In the opening statement of the trial of Taylornn Murphy, Jr., the prosecution recycled the very same words used above, overstepping the very same rules:

The sheer magnitude of the nearly half-decade long uninterrupted carnage attributed to the deadly feud between 3 Staccs, Money Ave and MHB is both mind numbing and spine tingling—chilling, I’m sorry, spine chilling or tingling.

*This trial will not, indeed this trial cannot present the full array of mayhem that these three gangs inflicted, not only upon one another, but all too often upon the innocent bystanders and law-abiding citizens and the communities that we live in and the people of the City of New York as a whole.*

You can, however, expect to hear during this trial testimony and see evidence about two murders.<sup>55</sup>

The flagrant violation of these rules in opening statements is troublesome. The violations demonstrate the license taken by pros-

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53. STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard No. 3-5.5 (AM. BAR ASS’N 3d ed. 1993).

54. Garnes Transcript, *supra* note 52, at 16 (emphasis added).

55. Transcript of Record at 45–46, *People v. Murphy*, No. 12/15 (N.Y. Sup. Ct. Feb. 22, 2016) (emphasis added).



ecutors in constructing narratives in mass gang takedowns. The frequency with which the attorneys, and particularly prosecutors, engage in misconduct by improper and inflammatory statements in closings is often attributed to the adversarial nature of the proceedings and the desire to respond to arguments from the defense. Yet, in each of these opening statements, the prosecutor has the first word. The prosecutor's job is to describe what the evidence will be and to do so fairly. The prosecutor has taken pen to paper and planned each word of the opening. To take these first moments of trial to claim that the "largest gang war" in New York's history is raging between two neighborhood peer groups, and that there is mayhem beyond the record attributable to these gangs, is as clear an instance of misconduct as one can imagine.

Given all the advantages of the mass trial and the conspiracy charges, it is hard to imagine why such excess is necessary. Why transgress the bounds of professional standards with exaggeration?

The answer to this question may be that, when prosecutors craft and repeat narratives about vicious gang wars, prosecutors come to believe the narratives and become effectively blinded to the fact that these narratives are improper, unfair, and untrue.

### III. THE HARMS CAUSED BY EXAGGERATED NARRATIVES

Inflammatory statements, even in pursuit of those charged with heinous offenses—*especially* in pursuit of those charged with heinous offenses—are inconsistent with the prosecutor's duty to do justice. Inflammatory statements to gain advantage in criminal proceedings or to garner positive media attention for district attorneys and law enforcement are improper. Yet there are reasons beyond these loosely enforced professional norms to eschew inflammatory statements. Inflammatory narratives which improperly attribute carnage and enormous amounts of violence to large groups of young men of color play into three pressing problems of society—racism, wrongful convictions, and mass incarceration.

#### A. *Racism*

The media is currently debating whether the inflammatory statements coming from the executive branch are fueling the increase in hate crimes.<sup>56</sup> President Trump has called gang members

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56. See Aaron Williams, *Hate Crimes Rose the Day After Trump Was Elected, FBI Data Show*, WASH. POST (Mar. 23, 2018), <https://wapo.st/2HQR6Ep> [<https://perma.cc/DJ6W-YM9M>]; John Eligon, *Hate Crimes Increase for the Third Consecutive Year, FBI Reports*, N.Y. TIMES (Nov. 13, 2018), <https://nyti.ms/2UYzB7k> [<https://perma.cc/4Y9U-GZ3C>].

“animals”<sup>57</sup> and has encouraged law enforcement to use excessive force in their detention.<sup>58</sup> President Trump has not hesitated to use the existence of gangs and dehumanizing language as an excuse to stoke irrational fear rooted in racism. This dog-whistle politics<sup>59</sup> both distracts and detracts from the failure to police and prosecute environmental and economic crimes while stoking fear of young men and immigrants of color. President Trump’s first attorney general, Jeff Sessions, similarly called for increased commitment to “the Department’s signature gun and gang crime reduction program, Project Safe Neighborhood,” claiming that “[n]ow, violent crime is on the rise,”<sup>60</sup> despite new lows in violent crime and murder in 2017.<sup>61</sup>

Unfortunately, the manipulation of fear and targeting of street gangs preceded the current Administration and will not disappear under different leadership. Indeed, as demonstrated in the New York City gang takedowns discussed in this Article, prosecutors who cast themselves as progressive have, prior to the current Administration, orchestrated tremendous media coverage in connection with the prosecution of gangs based on inflammatory and exaggerated statements to the media, courts, and jurors. They have contributed to the narrative that violent urban street gangs—

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57. Julie Hirschfeld Davis & Niraj Choshi, *Trump Defends ‘Animals’ Remark, Saying It Referred to MS-13 Gang Members*, N.Y. TIMES (May 17, 2018), <https://nyti.ms/2k53G3Q> [<https://perma.cc/9C4E-HEF8>].

58. Mark Berman, *Trump Tells Police Not to Worry About Injuring Suspects During Arrests*, WASH. POST (July 28, 2017), <https://wapo.st/2MNIPQI> [<https://perma.cc/EE49-PVNH>] (“When you see these thugs being thrown in the back of paddy wagon, thrown in, rough, I say please don’t be to nice. Like when you guys put somebody in the car and your protecting their head. . . . I said you can take the hand away.”).

59. For an analysis of coded racial appeals in political language, see IAN HANEY-LOPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL LANGUAGE REINVENTED POLITICS AND WRECKED THE MIDDLE CLASS* (2015).

60. Memorandum from Att’y Gen. Jeff Sessions to all United States Attorneys (Oct. 4, 2017). Project Safe Neighborhoods was started under the Bush Administration and created a new paradigm where United States Attorneys were to collaborate with local law enforcement to address local gun offenses that historically would not have been considered appropriate for federal intervention. Scott H. Decker & Jack McDavitt, *Project Safe Neighborhoods and the Changing Role of the U.S. Attorney’s Office*, in *THE CHANGING ROLE OF THE AMERICAN PROSECUTOR* 139, 145 (John L. Worrall & M. Elaine Nugent-Borakove eds., 2008) (“Prior to PSN, in many districts the U.S. Attorney did not play a leadership role in local crime control, as she or he was focused on ‘federal’ cases.”).

61. Ames Grawert & James Cullen, *Year-End Analysis: Crime and Murder Down in 2017*, BRENNAN CTR. (Dec. 19, 2017), <https://bit.ly/2Eme7cO> [<https://perma.cc/BM6B-T5Q7>] (citing an overall crime rate decline of 2.7 percent, and an average of 5.6 percent decrease in the murder rate in the 30 largest cities).

whether black or Latinx<sup>62</sup>—are among the greatest threats to our safety, even while ignoring violent white supremacist groups,<sup>63</sup> and failing to prosecute white-collar crimes<sup>64</sup> that often represent deeper threats to our democracy and environment.<sup>65</sup>

These choices are not without costs. The overblown narratives used by prosecutors claiming to protect the community from threats posed by local “gangs,” exaggerate the conduct of black and brown gangs, and feed our society’s overt racism and implicit biases. Indeed, it seems highly likely that these narratives contribute to implicit bias among the prosecutors themselves, and allow them to engage in the prosecutorial misconduct of making inflammatory, and even false, statements without experiencing the conduct as improper.<sup>66</sup> This is because immersion in a world where negative stereotypes are useful (whether accurate or inaccurate) may increase bias.<sup>67</sup> Gang units in police departments show high levels of im-

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62. Latinx is a gender-neutral, non-binary alternative to Latino/Latina. Tanisha Love Ramirez & Zeba Blay, *Why People Are Using the Term ‘Latinx’*, HUFFPOST (Oct. 17, 2017), <https://bit.ly/2zQwLr0> [<https://perma.cc/KC2K-CSKT>].

63. Janet Reitman, *U.S. Law Enforcement Failed to See the Threat of White Nationalism. Now They Don’t Know How to Stop It.*, N.Y. TIMES (Nov. 3, 2018), <https://nyti.ms/2PBXTEn> [<https://perma.cc/2TH4-R5S8>].

64. Jesse Eisinger, *Why Manafort and Cohen Thought They’d Get Away with It*, N.Y. TIMES (Aug. 24, 2018), <https://nyti.ms/2P3ywHB> [<https://perma.cc/B85N-ELND>] (discussing the failure to prosecute white-collar crimes and noting that filings against individuals have dropped to the lowest in 20 years and fines are down 90 percent under the current administration).

65. Editorial Bd., *The U.S. Needs to Crack Down on White-Collar Crime*, BLOOMBERG OPINION (Oct. 14, 2018), <https://bloom.bg/2RKq0D8> [<https://perma.cc/7ARB-82MV>] (noting that white-collar prosecutions were at the lowest levels in 20 years and concluding “[w]hite-collar crime is a menace, and the impunity of its ordinary perpetrators is intolerable”); see also, Catherine Rampell, *How America Stopped Prosecuting White-Collar Crime and Public Corruption, in Charts*, WASH. POST (Aug. 7, 2018), <https://wapo.st/2NgXzHs> [<https://perma.cc/DS4J-4X2G>].

66. See generally Tigran Eldred, *Prescriptions for Ethical Blindness: Improving Advocacy for Indigent Defendants in Criminal Cases*, 65 RUTGERS L. REV. 333 (2012). While it is possible that these attorneys draft press releases, opening statements, and closing arguments with full awareness that the statements approach or cross the line of prosecutorial misconduct, it seems much more likely that they experience the type of ethical blindness that Professor Tigran Eldred describes as leading defense attorneys to fail to recognize dereliction of their duties to provide effective assistance of counsel. *Id.* at 383.

67. Jessica J. Sim et al., *Understanding Police and Expert Performance: When Training Attenuates (vs. Exacerbates) Stereotypic Bias in the Decision to Shoot*, 39 PERS. SOC. PSYCHOL. BULL. 291, 298 (2013) (“If stereotypes continually provide a valuable heuristic [mental short cut] in a training environment, then even trained individuals may use them. . . . [T]his latter form of ‘training’ may exacerbate, not attenuate bias.”).

PLICIT bias not seen in other police departments<sup>68</sup> and are prone to think of and characterize alleged gang members as less-than human.<sup>69</sup> These units have been, and may well still be, particular loci of corruption and abuse in law enforcement.<sup>70</sup> Indeed, in each of the trials discussed above, NYPD officers central to the prosecution's case had been named defendants in multiple lawsuits alleging violation of civil rights, including wrongful arrest, false prosecution, and unlawful use of force.<sup>71</sup>

68. *Id.* at 299–300 (noting that “on-the-job experiences differentially reinforce racial stereotypes” and that special unit gang officers demonstrated higher levels of racial bias in the First Person Shooter Test than regular patrol officers).

69. CHARLES M. KATZ & VINCENT J. WEBB, *POLICING GANGS IN AMERICA* 195 (2006) (observing that gang units, while ethnically diverse, saw themselves as fighting “groups of evil perpetrators”).

70. There are myriad examples of corruption in gang units. Among the most infamous gang unit scandals is the Rampart scandal of the Los Angeles CRASH (Community Resources Against Street Hoodlums) Unit. See *The Rampart Scandal*, FRONTLINE, <https://to.pbs.org/2DsQkZN> [<https://perma.cc/YS6V-EACD>]. Two Las Vegas gang unit officers were convicted in a drive-by shooting in 1996. See Kim Smith, *Guilty Cop to Serve Time Elsewhere*, LAS VEGAS SUN (Aug. 2, 1999), <https://bit.ly/2R7tRoI> [<https://perma.cc/PN7K-NQ5P>]. In Chicago, the Area Central gang team, including a sergeant, were stripped of police powers after a federal probe into allegations that they were stealing drugs and cash from drug dealers. See Jason Mesiner, Jeremy Gerner, & David Heinzmann, *Chicago Cops Stripped Of Powers As FBI Probes Ripoffs Of Drug Dealers, Sources Say*, CHI. TRIBUNE (Feb. 1, 2018), <https://trib.in/2CNB7Bh> [<https://perma.cc/2P JL-CDZH>]. In New York City, gang unit officers are among the most sued for misconduct. See Ali Winston, *Looking for Details on Rogue N.Y. Police Officers? This Database Might Help*, N.Y. TIMES (Mar. 6, 2019), <https://nyti.ms/2EF4q9Q> [<https://perma.cc/6RTU-3ZAT>] (noting that “specialized units, like the Police Department’s gang squads, are also sued for misconduct more frequently than most patrol officers . . .”). See also Joseph Goldstein, *A Detective Lied to the Grand Jury. Now She’s Going to Jail*, N.Y. TIMES (June 27, 2018), <https://nyti.ms/2RBNTIj> [<https://perma.cc/X8PY-WDRQ>] (describing two unlawful arrests and accompanying perjury of NYPD Officers Kevin Desormeau and Sasha Neve “highly regarded officers . . . [from the] ‘aggressive, tight-knit unit, known as the Queens gang squad’”); Saki Knafo, *A Private Investigator Wanted to Prove His Clients Innocent. Will His Methods Be His Own Undoing*, N.Y. TIMES MAG. (Jan. 23, 2019), <https://nyti.ms/2MqX-elk> [<https://perma.cc/LLB2-7NSS>] (discussing the investigation, the harassment, and the wrongful arrest of Pedro Hernandez by NYPD Gang Unit Detective David Terrell, a detective with over 30 Civilian Complaint Review Board complaints and the prosecution’s refusal to dismiss charges even when witness confirmed pressure by Detective Terrell to identify Hernandez); Cindy Chang, *More Than Half of Searches by LAPD Gang Unit May Be Unconstitutional, Inspector General Says*, L.A. TIMES (Feb. 1, 2019), <https://lat.ms/2X7ovOF> [<https://perma.cc/C8RC-AFUM>] (reporting that an analysis based on a sample of stops from July and August 2018 using video from body-worn camera showed that more than half of searches by the gang unit lacked a lawful basis).

71. New York County case Gang Unit Detective Espindola had seven prior settled § 1983 law suits. Garnes Transcript, *supra* note 52, at 835–36. In the Bronx 120 trial of Carletto Allen, Detective Jeremiah Williams had settled § 1983 cases, as well as IAB- and CCRB-substantiated complaints. George Joseph, *NYPD*

### B. *Wrongful Convictions*

Under the best of circumstances, mass conspiracy cases raise the risks of wrongful conviction based on association. As Justice Robert H. Jackson put it:

When the trial starts, the accused feels the full impact of the conspiracy strategy. Strictly, the prosecution should first establish *prima facie* the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control. As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed.<sup>72</sup>

The gang narrative<sup>73</sup> and inflammatory statements increase the risk of wrongful convictions inherent in any conspiracy case. As mentioned above, the overt or predicate acts of some defendants relate to previously adjudicated state offenses. The mountain of evidence, including prior pleas or bad acts that would be excluded in a trial for a specific substantive crime, is admissible to prove both the existence of a conspiracy and conduct in furtherance of the conspiracy. The heart of a conspiracy, however, is that an actual agreement exists to commit target offenses. In round-ups of peer “street gangs” the notion that the random acts of gang members and non-gang members are the product of a conspiratorial agreement with specific intent to commit target crimes seems almost nonsensical. Nonetheless, the inflammatory narrative, the ability to infer agreement from conduct, and the fact that a defendant need not be present for or participate in all target offenses makes defending against

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*Detective with a Shady Past Helped Lock Up a Pot Dealer for Federal Conspiracy*, APPEAL (July 24, 2018), <https://bit.ly/2RVvDPg> [<https://perma.cc/CW9A-RCK8>].

72. *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring).

73. See Mitchell Eisen et al., *Probative or Prejudicial: Can Gang Evidence Trump Reasonable Doubt?*, 62 UCLA L. REV. DISC. 2 (2014) (finding “reverse nullification” in a simulated trial with designedly weak evidence). A 2014 simulated trial found that mock jurors exposed to gang allegations were three times more likely to vote “guilty” than mock jurors who were not exposed to gang allegations. *Id.* One of the researchers, Judge Dohi, is a Los Angeles County Superior Court Judge, and the simulation was designed so that all reasonable mock jurors would have to acquit based on lack of evidence. *Id.* The mock jurors were generally college students who had views that were skeptical of law enforcement, so the prejudicial impact of gang allegations on real jurors would likely be far greater.

the conspiracy nigh impossible. Thus, most individuals will accept a plea bargain to avoid the risk of trial regardless of guilt or innocence, and those that go to trial will face a narrative about helping a violent street gang that is responsible for years of gang war, whether or not they themselves are alleged to have engaged in violence. The inflammatory narrative raises the already-high risk of wrongful conviction.

### *C. Mass Incarceration*

In mass indictments like the Bronx 120 and the Harlem 103, dozens of individuals are joined to sprawling conspiracies that include accusations of shootings and homicides. Although homicide levels in New York are at historic lows, down by 80 percent from the early 1990s, if we lock up dozens of individuals for extended prison sentences on felonies for being associated with other individuals who recklessly or intentionally caused a death, we cannot hope to lose our status as the country that incarcerates the largest number of human beings in the world, both in gross numbers and per capita. If our “progressive” prosecutors imprison young people of color based on theories of vicarious liability developed for sophisticated criminal organizations that infiltrate the legitimate economy, there is little hope that our country can reduce mass incarceration.

### CONCLUSION

Prosecutors have vast discretion and are powerful voices in both the criminal justice system and in society. Adopting and using overblown narratives regarding gang crime is an abuse of this discretion and power. The narrative that attributes extensive mayhem to all those included in gang sweeps is an abuse that is neither justified nor supported by the allegations and evidence that support mass indictments. However, because the inflammatory narrative comports with popular narratives relating to gang violence, it is an abuse that is unlikely to subject prosecutors to disapproval or sanction. Nonetheless, if prosecutors wish to claim a progressive agenda, it is their duty to contribute to actual justice in our society. Overblown and inflammatory narratives, particularly those coupled with mass indictments on conspiracy charges, deny defendants basic procedural and substantive justice and contribute to racial injustice and mass incarceration. Moreover, these inflammatory narratives feed both implicit and explicit racial bias in prosecutors’ offices, in court systems, in law enforcement, and in the society at large. Prosecutors are uniquely situated to educate themselves and to resist

the urge to promulgate narratives of rampant criminality that ease the path to conviction and mass incarceration by feeding the fears of the public, the judiciary, and jurors.